

MR. JUSTICE DOUGLAS

ABE FORTAS

A man may live a long and active life — even in the aquarium of public office — without revealing and, indeed, without discovering his essential convictions. There are many hiding places; there are many factors which invite avoidance of this painful confrontation: the pressures of too little time; the exigencies of the moment; the rationalizations engineered by the overwhelming virtue of self-preservation; the primacy of the need to accommodate one's views to those of others; the driving need for immediate results.

A Congressman, a Senator — even a President — may serve his terms of office and still avoid the awesome question — “What do I *really* believe?”

Even for a Justice of the Supreme Court, beliefs may remain shrouded and ill-defined. Long tenure of exalted office and long hours of cloistered work do not always drive into sharp focus or expose to public view the inner views that lie close to the secret heart.

But for a Justice of this ultimate tribunal, the opportunity for self-discovery and the occasion for self-revelation are unusually great. Judging is a lonely job in which a man is, as near as may be, an island entire. The moment is likely to come when he realizes that he is, in essential fact, answerable only to himself.

Sometimes this splendid isolation yields a reading of the law in the generous light of a noble spirit. Sometimes the results are unhappy; and sometimes the Judge's acceptance of himself as the ultimate referent induces a fearful, timid, wavering, distrustful gloss on the words of the statutes and precedents.

In the case of William Orville Douglas, a quarter of a century on the bench of the Supreme Court of the United States and more than 750 opinions have etched, in strong and deep characters, a powerful testament of faith. Justice Douglas has not been merely the co-author of volumes of judicial reports. He has not been merely one of nine. He has been a sharp, rugged exponent of beliefs profoundly held, clearly realized, and forcefully articulated. He has brought to the law the strong and astringent qualities of his own personality — strength rooted in sensitivity; freedom founded upon struggle; and compassion emerging from pain.

He came to the Court as a lawyer, teacher, administrator and reformer whose career had been substantially confined to the narrow limits of the corporate domain. In his visible life, one might have observed the seeds of his commitment to individual freedom; but there had been no public manifestation. One might have guessed from his Westernism, his loneliness, his poverty, his stern puritanical insistence upon individual excellence in himself and others; his shy, but intense personal loyalties — that here was a man whose personal torment would yield a rich harvest of dedication to humanity.

— But the evidence was by no means conclusive. Similar seeds have borne sour fruit.

In fact, as all the world knows, William Orville Douglas has vindicated, and not denied, the years of his youth. In his case, the years of quiet desperation — the struggle with adversity — the deep wounds inflicted upon a sensitive, introverted soul by men and institutions who differed, as night and day, from the glorious beauty and cleanliness of his beloved mountains — all of these produced idealism and fierce dedication — not cynicism and surrender.

It is characteristic of Douglas that his intensity emerges as neither disorganized nor sentimental. His beliefs, however savagely they burn, emerge as a well-articulated conception of our fundamental legal system. However personal may be the inspiration for his convictions as to the rights of the individual, however intense his views as to the nature of our economy, their realization is logical, precise and coldly pragmatic.

It could not be otherwise with Mr. Justice Douglas. His mind is a cutting instrument of fabulous sharpness. His intellect is a well-ordered, highly organized machine. For this man of intense sentiment, sentiment which cannot be sharply and effectively deployed is slop.

To himself, to friend and foe alike, Mr. Justice Douglas is a harsh critic who lies in wait for the slothful, the untidy, the drooling, the soft and sappy. The unerring leap to the jugular, the fantastic speed, the cleanliness of the kill — these are the marks of Douglas' mind.

So it is that to Mr. Justice Douglas the pattern of our system is clear, logical and direct. To him, our Constitution is a mandate for strong individuals functioning in the framework of strong government. To him, government may not impinge upon the freedom of the individual. Government and the individual are equals — equal in right and in dignity. Correspondingly, government must assure that individuals do not infringe the freedom of other individuals. — Beyond this point of individual freedom, government has and must have full power to tax, to regulate, to make the rules and to enforce them.

The conflict in this proposition which others see is, to Douglas, an intolerable denial of faith. He does not believe that individual freedom negates effective government. He does not believe that "balance" can be obtained by nice, judicial gradation — or degradation — of individual rights. He does not believe that we can keep the scales in balance between effective government and individual freedom by adding or subtracting ounces on the one side or the other. He believes that "balance" can be obtained only by equating the full force of individual freedom on the one hand, and, on the other, the full power of effective government, short of the point where it becomes adversary to the individual.

Since the early days of his tenure, Douglas has insisted upon a long reach of the arm of government to regulate, to control and to direct the economic struggle. In a broad range of situations, government may fix prices, define

tolerable practices, regulate wages and working conditions, take property for broadly defined public purposes upon careful payment of just compensation. The states as well as the federal government have plenary power to meet public need.

Our basic economic and financial statutes, deeply imbedded in the nation's legal system, require government to protect the economically small from aggressions by the great: to prevent the development of monopolies, to thwart the price-fixer and the market-rigger, to defend the small stockholder from the predators of the market-place and of the directors' room. As Douglas views it, only by the faithful performance of this economic duty can government achieve a strong nation of sturdy individuals.

But this strong arm of government must break its swing when it approaches the arc of the individual's sovereignty. Law and order, national security and governmental perpetuation are the provinces of government. When these are imperilled by the individual, government may act. But in so doing, it acts as adversary. Plaintiff and defendant — state and individual — are equally sovereign. Each must respect the sovereignty of the other. The state — as well as the individual — is meticulously bound by the terms of the social compact. Whatever the alleged crime — whatever the apparent danger — the rules must be observed, sovereign to sovereign.

Just as government in the economic sphere has an obligation to prevent cannibalism, to protect the small from the overweening power of the great, so in the human domain, it is obliged, not only to refrain from repressive acts, but also affirmatively to protect the weak from the strong, the minor from the major. The Negro, the indigent, the vagrant, the subversive, the suburbanite: these, too, are objects of solicitude. All — not just some — of our citizens must have counsel available to them if they are apprehended by the state. They must be protected from disfranchisement, from persecution, from deprivation of equal access to public facilities, broadly defined, from denial of freedom to travel, freedom to speak, and freedom to be free.

This is powerful prescription. Mr. Justice Douglas' world is not for the faint-hearted. It is a universe of strength, of idealism, of nobility. He sees our constitutional system as a plan for greatness: a program for effective government, governing and being governed by strong and effective individuals.

It is a tribute to him and to staunch colleagues that this bold conception which, a few short years ago, might have graced an academician's essay has now been so largely realized in our basic law. It is, I think, a pattern of greatness which will inspire mankind for generations to come.